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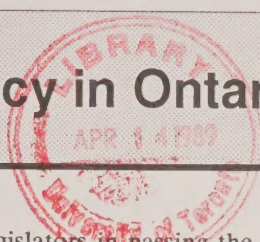
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Information and Privacy Commissioner / Ontario

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Access and Privacy in Ontario: One Year Later



The *Freedom of Information and Protection of Privacy Act* gives citizens a right to obtain access to government records and their own personal information, which fundamentally alters the way the government must deal with the massive volume of information in its possession. However, this right is not absolute, and the *Act* contains specific exemptions to the general right of access which must be taken into account by everyone involved with this new law. Exemptions cover categories of records such as Cabinet documents, law enforcement records, other people's personal information, and sensitive commercial information. The Commissioner's role is to review and determine whether the basis for the government's refusal to disclose a record is correct in law and consistent with the principles set out in the *Act*. If the Commissioner agrees with the government's interpretation, he upholds the decision to deny access; if not, he orders the government to release the record.

One might ask what is the purpose of having an *Act* which gives the public a general right of access only to take it away by creating specific exemptions? The answer is that all freedom of information schemes acknowledge that the release of certain types of information would result in a degree of harm which outweighs any benefit derived from the public's right of access. Exemptions such as the ones included in the Ontario *Act* also exist in other jurisdictions, including the United States, Sweden, Australia, and Canadian federal legislation. To illustrate this point, take the example of the exemption covering personal information. The *Act* provides that, as a general rule, personal information about one individual should not be disclosed to anyone other than the person it concerns. Why? Because the

legislators in passing the *Act* recognized that people who supply personal information in confidence to their government are entitled to expect that the information will be treated confidentially.

Some might argue that the exemptions contained in the *Act* are too broadly worded. This is certainly an appropriate matter for public debate, and ultimately the Members of the Ontario Legislature will decide if amendments are in order. However, one thing is clear: the Commissioner must work within the parameters of the existing law, and he cannot alter the rules that are spelled out in the *Act*.

The *Act* establishes a set of rules which bind everyone who is involved with the *Act*. When citizens want access to a government record, they make an initial request to the government agency which has custody of the record. If access is refused, the *Act* provides a right to appeal the government's decision to the Information and Privacy Commissioner.

When an appeal is received, the Commissioner assigns a member of his staff, known as an Appeals Officer, to meet with the appropriate government officials and the appellant to try and mediate a settlement. Generally, settlement attempts have been successful when the government is prepared to release more information and the requester is prepared to ac-

cept less. However, some appeals have been resolved by simply clarifying or explaining the terms of the *Act*. In the first year of operation, the majority of completed cases were settled through mediation: 95 out of the 198. This is an encouraging sign for the long term success of the appeals process.

When mediation is not totally successful, the case proceeds to an inquiry. Experience in the first year has shown that many appeals involve only a small portion of a much larger record, most of which has already been released to the appellant by the government. However, the one or two paragraphs under dispute may contain precisely the information the requester wants. During the inquiry stage, the remaining issues are refined and a report is prepared by the Appeals Officer outlining the matters still in dispute. This report is sent to all parties to ensure there are no misunderstandings. The Commissioner reviews the records and asks the parties to make written submissions. If a new issue emerges following distribution of the Appeals Officer's Report, the parties are made aware of the details and given an opportunity to make further submissions. The Commissioner may, and generally does, conduct his own research, and considers the results of this investigation together with the submissions received from the parties before issuing an order disposing of the appeal. This order is binding on all the parties, including the government.

The Commissioner's power to make a binding order is significant. Apart from

the province of Quebec, most other Information and Privacy Commissioners perform an Ombudsman-like function; they recommend that the government take a particular action, but they cannot force compliance with their recommendations. In order to reach a final determination in these other systems, citizens must turn to the court system, an expensive and often time consuming process. To illustrate, in the Canadian federal system, the courts have been called upon to decide fewer cases in almost 6 years of operation than the Ontario Commissioner has disposed of in the first year of his mandate.

It is much too early to decide which type of freedom of information scheme will best serve the public's right of access to government records. The Ontario Commissioner's power to make a binding order distinguishes the Ontario system from the federal one, and imposes a high degree of responsibility on the Commissioner. He must be scrupulously fair and even-handed in the disposition of appeals, and the quasi-judicial nature of the role requires that he give due consideration to the *Act's* exemptions and uphold them where they apply. In some cases, because the *Act* encompasses both access to information and the protection of privacy, the Commissioner has to balance these two values which may be in conflict. At the same time, the Commissioner must conduct appeals fairly, giving all parties an opportunity to comment before making his decision.

Is the Ontario *Act* working? The answer to that question will always depend on one's perspective, but there are some clear signs of success. After one year of operation, preliminary statistics indicate that approximately 4700 requests for information were filed with the various government ministries and agencies covered by the *Act*. The majority of them (56%) were answered by providing the requesters with 100% of the information they sought, while 77% received all or part of what they requested. Further, 80% of all requests were completed within 30 days. A total of 350 cases were appealed to the Commissioner's Office in the first year, representing a ratio of

approximately 1 appeal for every 13 requests. Of these 350 appeals, 198 or 57% were resolved during 1988. Considering the unavoidable preoccupation every new organization must have with renting office space, hiring staff, designing systems, developing procedures and getting organized, it is fair to say that the Commissioner's Office is off to a good start.

Ontario's *Act* will be judged by how successfully it changes the government's attitude and its information practices, and by the level of acceptance within the government bureaucracy of the new rights this law gives to citizens of the province.

A great deal of ground work has been done during the first year of operation, which will reap benefits as the agency matures. Systems have been developed; staff have been trained; computer equipment and programs are in place, and operational efficiencies are beginning to be realized. A communications program is now in the formative stages, and a number of initiatives are under way, including a quarterly newsletter, containing summaries of orders and settled cases. The office has produced a video and written a brochure, which is widely available throughout the province. The Commissioner and others in the agency have spoken to many groups, both within and outside the government, and the agency expects to become

more actively involved in outreach efforts as time goes on.

It is recognized that there will always be unhappy users of this, or any, freedom of information and privacy system. However, one should not lose sight of the fact that most requesters under Ontario's *Act* receive everything they ask for, without fee, and within days of submitting their request. Requesters who are denied access to information by the government now have a right to appeal the decision to the Commissioner's office. The Commissioner's office is an adjudicative body, responsible for making decisions affecting people's rights. As such, it must provide certain basic procedural standards which result in a process that often takes more time than any of us like. The Commissioner's orders are similar to judgments of the court, and accordingly, they must be carefully reasoned and sound in law.

In the long run, Ontario's *Act* will be judged by how successfully it changes the government's attitude and its information practices, and by the level of acceptance within the government bureaucracy of the new rights this law gives to citizens of the province. These broad criteria for judging the success of the *Act* cannot be determined after one year of experience, but some preliminary signs of success are emerging, and there are clear grounds for cautious optimism.

In two years time, a standing committee of the legislature will conduct a thorough review of the *Freedom of Information and Protection of Privacy Act*, and members of the public will have an opportunity to suggest ways of improving the system. Between now and then, it is safe to say that everyone connected with this new law - users, government administrators, Management Board and the Commissioner's office - will continue to learn new things about this remarkable *Act*, and to participate constructively in its evolution.

by John Eichmanis



Commissioner's Message

First Annual Privacy "Summit"

Federal Privacy Commissioner, John Grace, hosted a "Privacy Summit" at his offices in Ottawa on February 22nd. Attending from the Federal Privacy Commissioner's office were Alan Leadbeater, Executive Director; Gerry van Berkel, Legal Counsel and Johanna Thomas, Policy Analyst. Attending from Quebec's Access to Information Commission were President Jacques O'Bready; Carole Wallace, Commissioner; Andre Ouimet, Acting Director, Legal Services, and Clarence White, Director of Compliance and Investigations. In addition to myself, attending from Ontario's Office of the Information and Privacy Commissioner were Ann Cavoukian, Director of Compliance; John Eichmanis, Senior Policy Advisor and Valerie Sharp, Executive Assistant.

Each of our agencies has varying statutory powers in our legislation to conduct research and to comment on proposed legislative programs regarding the protection of individual privacy. This initial meeting was arranged with a view to exploring the possibility of conducting joint research into privacy issues of common concern and to keep each other abreast of developments in Quebec and Ontario and at the federal level.

We discussed a number of privacy-related topics including confidentiality of medical records, controls on computer-matching activities and controls on the use of universal personal identifiers such as the Social Insurance Number. In the discussion on the confidentiality of medical information, the subject of Ontario's forthcoming omnibus statute arose, with its far-reaching implications pertaining to the collection, retention, use and disclosure of medical information. Also related to the confidentiality of medical information was the Federal Privacy Commission's

new policy on AIDS and the *Privacy Act*, which is expected to be released in the near future.

We also discussed the use of the Social Insurance Number and the federal government's commitment to eliminate the use of the SIN as an employee number for public servants. We learned that federal-provincial discussions are presently ongoing concerning possible reductions among the provinces regarding their own use of the Social Insurance Number.

A discussion of the voluntary privacy codes adopted in the private sector also took place. Specifically, the question of whether the private sector would voluntarily develop their own privacy codes in an effort to avoid being regulated into doing so by the government was explored. Some financial institutions such as the banking community have already developed and adopted their own privacy codes, reflecting a shared concern for the confidentiality of personal information and measures to ensure its security.

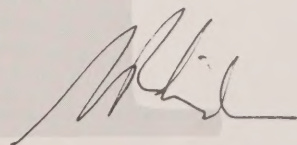
The discussions were useful in providing each of the various commissioners with insight into work being done by other jurisdictions in Canada, both federally and provincially. It is hoped that this group may be able to assist each other, informally, in various research ventures and submissions to government with respect to these and other topics. The mutual endorsement of policies developed by the respective commissions was also considered, with a view to ensuring a consistent approach to similar issues.

While in Ottawa I also met with officials from the Regional Municipality of Ottawa - Carleton, the City of Ottawa and the City of Gloucester. The object of

these meetings was to meet some of the people who will be involved with the implementation of the *Act* when municipalities come on board in January, 1991.

There are a number of significant differences between information and privacy issues at the municipal level. Management Board, Information and Privacy Branch, has already done a great deal of work, including an extensive consultation process to ensure that most of the issues have been carefully thought out and dealt with in advance. I thought it was important for the Commissioner's Office to become involved in the process as well. Over the course of the next year and a half we expect to work closely with Management Board in training and preparing the almost 3,000 municipal agencies that will be brought within the jurisdiction of the *Act*. It is a mammoth undertaking and a great challenge that we are looking forward to.

The American Society of Access Professionals (ASAP), in conjunction with the Canadian Access and Privacy Association, is presenting an international workshop, *Access '89: Practical Approaches to Access and Privacy*, in Ottawa on April 13 and 14, 1989. I understand that registration for this workshop is approaching the 400 mark. Further details on this, as well as a one-day seminar on privacy in the information age in Toronto on May 29, 1989, are available from Tom Riley of Riley Information Services, P.O. Box 261, Station F, Toronto, Ontario, M4Y 2L5, phone (416)593-7352.



Conference Proceedings

A transcript of "*Key to the 90s-Privacy & Access*", a conference sponsored by the Freedom of Information and Privacy Branch, Management Board of Cabinet, is now available.

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Questions regarding the conference proceedings should be directed to the Information and Privacy Commissioner/Ontario.

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Outreach Activities

Listed below are some of the organizations that the Commissioner and staff members have met with over the past several months:

Ontario Psychological Association
Ontario Securities Commission
Colleges of Applied Art & Technology
Rent Review Hearings Board
C.B.A.O. - Labour Law Sub-section
C.B.A.O. - Administrative Law Section
C.B.A.O. - Research & Policy Analysis Section
C.B.A.O. - Young Lawyers' Division
Ryerson School of Journalism
Canadian Information Processing Society
Ontario Systems Council
Personnel Association of Ontario
American Society of Access Professionals
Database Association (Ontario) Inc.
The Council of Information and Referral Services
Pay Equity Commission
Association of Records Managers & Administrators
Queen's Park Press Gallery Members
Toronto Association of Law Librarians
Canadian Public Personnel Management Assoc.

If you are interested in learning more about the Information and Privacy Commissioner's public education program, please contact our office.

New Telephone Number

Effective April 1, 1989, the Information and Privacy Commissioner's telephone number is:

(416) 326-3333